

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FOX VIDEO PRODUCTIONS, INC.	:	
AND JOSEPHINE FOX	:	DETERMINATION
	:	DTA NO. 819348
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 1997 through August 31, 2000.	:	

Petitioners, Fox Video Productions, Inc. and Josephine Fox, 153 New Dorp Lane, Staten Island, New York 10306, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1997 through August 31, 2000.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on May 25, 2004 at 1:15 P.M. Petitioner appeared by Eileen Gentile, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Martin Raschkovan).

Petitioners' reply brief was due on September 21, 2004, which date commenced the three-month period for the issuance of this determination.

ISSUES

I. Whether it was appropriate for the Division of Taxation to increase the reported gross sales by the difference between it and the amount of the estimated average bank deposits.

II. Whether, in the absence of documents supporting an exemption from tax, petitioners are liable for sales tax on the difference between the gross sales and taxable sales reported on the business's sales tax returns.

FINDINGS OF FACT

1. During the period in issue, petitioner Fox Video Productions, Inc. ("Fox Video") operated a video production business which was based in New York. Fox Video videotaped events such as weddings, confirmations and baptisms. It also provided editing and processing services. Petitioner Josephine Fox was the president of Fox Video and managed the affairs of the corporation.

2. The Division of Taxation ("Division") mailed a letter which scheduled an appointment to conduct a sales and use tax audit. The letter requested that Fox Video have all of its books and records pertaining to its sales and use tax liability available on the appointment date including, "financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates." The letter further explained that "[e]xemption certificates not made available at this appointment may be disallowed. If an exemption certificate is disallowed, you will be held liable for any tax due on the related transactions."

3. After a series of postponements at petitioners' request, the audit proceeded and the Division found that the business's record keeping was limited. Among other things, the Division determined that Fox Video did not have a sales journal, purchase journal or canceled checks. Further, the firm was missing certain bank statements, sales invoices and exemption certificates.

4. The audit proceeded on the premise that the firm's bank deposits equaled sales. The Division determined that the total sales during the audit period based on bank deposits exceeded

the firm's gross sales reported on Fox Video's sales and use tax returns by \$50,526.00.¹ The Division divided the amount of additional audited sales by the firm's reported gross sales to calculate an error rate of 0.2613. Thereafter, the Division multiplied the reported gross sales by the error rate to calculate the additional sales per the audit. This procedure led the Division to conclude that tax was due on the additional sales in the amount of \$4,168.44.

5. The Division also observed that, during the audit period, the firm reported gross sales of \$193,366.00 consisting of taxable sales of \$98,119.00 and nontaxable sales of \$95,247.00. Of the latter amount, petitioners provided documentation which substantiated that sales of \$11,144.83 were not subject to tax. However, they were unable to provide documentation to substantiate the remaining amount of nontaxable sales. Consequently, this amount was held subject to tax resulting in additional tax due of \$6,976.39.

6. On the basis of the foregoing audit, the Division issued a Notice of Determination (Assessment # L-019644681-7), dated June 18, 2001, to Fox Video which assessed sales and use taxes in the amount of \$11,144.83 plus interest in the amount of \$3,716.57 and penalty in the amount of \$4,291.92 for a balance due of \$19,153.32. The Division also issued a Notice of Determination (Assessment # L-019691559-7), dated July 12, 2001, to Josephine Fox, as an officer or responsible person of Fox Video, which assessed sales and use taxes in the amount of \$9,612.90 plus interest in the amount of \$3,004.95 and penalty in the amount of \$3,709.25 for a balance due of \$16,327.10. The difference in the amount assessed is attributable to the fact that Josephine Fox was not assessed for the quarters ended November 30, 1997 and February 28, 1998.

¹ Since certain bank statements were unavailable at the time of the audit, the Division utilized an average of the bank statements which were available.

7. A conciliation conference was held on August 6, 2002 which resulted in a reduction of the amounts assessed in the notices. The notice issued to Fox Video was reduced to \$7,620.86 plus interest at the applicable rate. The notice issued to Josephine Fox was reduced to \$5,868.15 plus interest. In each instance, the reduction in the assessments was premised upon the presentation of additional documentation establishing that certain sales were exempt from tax. In addition, in each instance, the penalty was canceled.

SUMMARY OF THE PARTIES' POSITIONS

8. At the hearing, petitioner Josephine Fox presented the following testimony with respect to certain companies with whom Fox Video conducted business:

a. During the period in issue, Fox Video, as a subcontractor, shot weddings for Pace Photographers. Fox Video turned the videos over to Pace Photographers which paid Fox Video for its services. Ms. Fox received a Form 1099 from Pace Photographers and reported the amount listed on the form as income.

b. Krystle Clear Production, Inc. is a firm located in New Jersey which retained Fox Video to create a video. The work performed for this company was conducted solely in New Jersey and the video created for this company was delivered in New Jersey.

c. Video Tech and Joseph Zullo are located in New Jersey and the business that petitioners did for them was conducted in New Jersey.

9. Petitioners' representative contends: that many of the disallowed nontaxable sales involved wholesale activity on the part of Fox Video; that many of the disallowed nontaxable sales were actually performed in another state such as New Jersey; and, that some of the disallowed nontaxable sales were to exempt organizations such as the Boy Scouts. Petitioners'

representative was given time to submit additional evidence after the hearing. However, no further evidence was provided.

10. The Division maintains that the shooting, editing and dubbing of the tapes produce tangible personal property which is subject to tax. According to the Division, while Fox Video was contacted and retained by a church or other exempt organization to make a video, the videos were sold to the ultimate consumer and therefore taxable. The Division further explained that it regarded the editing and dubbing as subject to tax as “repair and maintenance.” It was acknowledged by the Division that some of the sales might be exempt because the sale was made to an exempt organization. The Division also stated that the sale would be exempt if it were made out of New York or if it was made to a wholesaler. However, the Division was never given any documentation to verify that an exemption was appropriate. Nevertheless, it was willing to look at any additional information that petitioner was able to produce.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed was incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . .” (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the

taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see, Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

B. In view of the lack of sales records, it was reasonable and appropriate for the Division to rely upon bank deposits as a means of estimating sales (*see e.g., Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678, *lv denied* 77 NY2d 803, 567 NYS2d 643). Therefore, the burden rests upon petitioners to demonstrate that the method of audit or the amount of the assessment was erroneous (*see, Matter of Your Own Choice, Inc., supra*). Since they have not presented any evidence which would satisfy this burden, this portion of the assessment is sustained.

C. In order to foster the proper administration of the sales tax and to prevent tax evasion, Tax Law former § 1132(c) presumed that all receipts from the sale of property or services of any type (mentioned in subdivisions [a], [b], [c] and [d] of Tax Law § 1105) are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable is on the person required to collect the tax or the customer. For the period at issue, former section 1132(c) provided two exceptions to this presumption of taxability: 1) where a vendor takes a resale or exemption certificate from the purchaser to the effect that the property was purchased for resale or for some use by reason of which the sale is exempt from tax; and 2) where a vendor takes “an affidavit, statement or additional evidence” from a purchaser to the effect that the purchaser is an entity exempt from sales tax. Where such materials were in proper form, the vendor was protected and the burden was on the purchaser to prove that the receipt was not taxable. However, unless such a certificate was taken by the vendor, “the sale [was] deemed a taxable sale at retail” (Tax Law former § 1132[c]).

D. Here, petitioners did not present any documentary evidence substantiating their claim that certain sales were exempt from tax. Therefore, the Division properly relied upon the presumption of taxability to disallow the claimed exempt sales (Tax Law former § 1132[c]; *see, Matter of Academy Beer Distribs.*, Tax Appeals Tribunal, January 21, 1993, *confirmed* 202 AD2d 815, 609 NYS2d 108, *lv denied* 83 NY2d 759, 616 NYS2d 14). The testimony of Josephine Fox with respect to the nontaxable status of certain sales, by itself, is insufficient to sustain petitioners' burden of proof.

E. The petition of Fox Video Productions, Inc. and Josephine Fox is denied and the notices of determination, dated June 18, 2001 and July 12, 2001, as modified by the conciliation orders dated August 6, 2002, are sustained.

DATED: Troy, New York
November 4, 2004

/s/ Arthur S. Bray
PRESIDING OFFICER